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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

MUR 6548)

Eric for Texas Campaign)

David Oberg as treasurer)

Eric Klingemann)

GUNS+)

DISMISSAL AND
CASE CLOSURE UNDER THE
ENFORCEMENT PRIORITY
SYSTEM

SENSITIVE

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue. These criteria include, without limitation, an assessment of the following factors: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), and developments of the law. It is the Commission's policy that pursuing relatively low-rated matters on the Enforcement docket warrants the exercise of its prosecutorial discretion to dismiss cases under certain circumstances or, where the record indicates that no violation of the Act has occurred, to make no reason to believe findings. The Office of General Counsel has determined that MUR 6548 should not be referred to the Alternative Dispute Resolution Office.

For the reasons set forth below, the Office of General Counsel recommends that the Commission exercise its prosecutorial discretion and dismiss this matter as to Respondents Eric for Texas Campaign and David Oberg in his official capacity as treasurer (collectively the "Committee"). The Office of General Counsel also recommends that the Commission find no

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1 reason to believe that Respondents Eric Klingemann ("Klingemann")¹ and GUNS+ violated the
2 Act or underlying Commission regulations as to the allegations contained in the Complaint.²

3 The Complaint asserts that a Klingemann supporter circulated e-mails that included two
4 flyers advertising a 25-gun raffle, the proceeds of which were intended to benefit the
5 Committee.³ Compl. at 1. The first flyer explains that a maximum of 250 raffle tickets would be
6 sold, at \$100 per ticket and, beginning in "late spring 2012," one drawing per week would be
7 held, with a weekly prize of one gun, for 25 weeks. *Id.*; *see also* Compl., Ex. 1. The flyer
8 further states that raffle prizes were to be picked up at GUNS+ of Georgetown, Texas, which is
9 listed as a sponsor, along with "Eric Klingemann for Congress." *Id.* The second flyer lists the 25
10 types of guns to be raffled off and includes the business logos for 21 different gun
11 manufacturers. Compl. at 1; *see also* Compl., Ex. 2.

12 Observing that the Act and Commission regulations prohibit corporations from making
13 contributions in connection with a Federal election, the Complaint maintains that the Committee
14 may have received illegal corporate contributions. Compl. at 1-3. First, assuming that GUNS+
15 is a corporation, the Complaint states that it is "unclear" how GUNS+ may have "sponsored" the
16 raffle and suggests that GUNS+ might have donated the firearms to the Committee at no cost.
17 *Id.* Such a donation, the Complaint asserts, would constitute an illegal in-kind corporate

¹ Mr. Klingemann was an unsuccessful primary election candidate in Texas's 31st Congressional District, held on May 29, 2012.

² Complaint Filed: April 5, 2012. Response from GUNS+ Filed: April 25, 2012. Response from Eric Klingemann Filed: May 1, 2012. Response from Committee Filed: May 15, 2012. Statement from non-Respondent William Kelberlau Filed: July 30, 2012.

³ The Complaint includes the flyers, but not the e-mail.

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1 contribution in violation of 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 114.2(a), (d). Compl. at 1-2.⁴

2 *Id.*

3 Second, the Complaint notes that corporations are generally prohibited from using
4 corporate resources to facilitate the making of contributions to Federal political committees,
5 including fundraising activities. *Id.* Accordingly, given that a corporation's logo could
6 potentially constitute a corporate resource, the Committee's alleged inclusion of logos on the
7 second flyer, as part of its fundraising, might constitute corporate facilitation, in violation of
8 11 C.F.R. § 114.2(f). *Id.*

9 Finally, the Complaint maintains that, although the e-mails allegedly constituted "general
10 public political advertising," they failed to include (1) a disclaimer stating that the Committee
11 had paid for them and (2) a notice requesting contributors' names, addresses, occupations and
12 names of employers. *See* 11 C.F.R. §§ 110.11(a) and (b)(1); *see also* 11 C.F.R. § 104.7(b).⁵

13 A Response on behalf of GUNS+, including a sworn affidavit, was filed by Kristi Simank
14 ("Simank"). Simank avers that she is the president and chief executive officer of Applied
15 Response Solutions, LLC ("ARS"), the entity that owns GUNS+. *Id.*⁶ According to Simank,
16 neither GUNS+ nor ARS agreed to co-sponsor the gun raffle or authorized the use of the
17 "GUNS+" name in connection with the Klingemann campaign. *Id.* In addition, Simank attests

⁴ The Complaint appends the results of an internet search as to the value of the guns and claims that the firearms ranged in price from approximately \$176 to \$1,800, for an approximate total value of \$12,700. Compl. at 1; *see also id.*, Ex. 3.

⁵ The Complaint also alleges that the e-mails failed to include information that may have been required by section 6113 of the Internal Revenue Code. Under 26 U.S.C. § 6113, certain tax-exempt organizations that are not eligible to receive tax deductible charitable contributions, and whose gross receipts normally exceed \$100,000, must disclose that contributions are not deductible for Federal income-tax purposes as charitable contributions. Because the Commission has no jurisdiction over section 6113, we do not address this allegation.

⁶ Simank's Response and attached Certificate of Filing with the State of Texas (Ex. B) indicate that GUNS+ and ARS are limited liability companies, not corporations. Because it appears that GUNS+ did not make a contribution to the Committee, *see infra*, we do not explore this distinction further.

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1 that GUNS+ did not donate firearms or anything else of value to the Committee, but rather
2 offered to sell the guns to the Committee at retail price in connection with the raffle. *Id.* Finally,
3 as of April 25, 2012, the date of her Response, Simank states that “no purchase was ever made”
4 by the Klingemann campaign “and no sale was actually consummated.” Simank Resp. at 1.

5 In his Response, candidate Klingemann asserts that the e-mails were distributed by a
6 “private individual to a discrete list of recipients,” and not by the Committee. Klingemann Resp.
7 at 2-4. According to Klingemann, the Act and Commission regulations generally do not address
8 internet communications. Specifically, Klingemann cites the Commission’s *Campaign Guide for*
9 *Congressional Candidates and Committees* at 139, n. 1, for the proposition that “the term general
10 public political advertising,” as found in 11 C.F.R. § 100.26, does not include any internet
11 communication except for a communication placed for a fee on another person’s website.
12 Klingemann Resp. at 2. Nonetheless, in an effort to avoid “any semblance of impropriety,”
13 Klingemann represents that the Committee will ask the private individual to remove the logos
14 and include a disclaimer and a notice to contributors, as described above, in any subsequent e-
15 mails. *Id.* at 3.⁷

16 Klingemann adds that his Committee had arranged to purchase firearms from GUNS+ at
17 a “fair market price” to be used as raffle prizes. *Id.* According to Klingemann, the raffle had not
18 occurred as of the date on which he filed his Response. *Id.* However, if and when the raffle
19 occurs, Klingemann represents that the Committee will disclose the appropriate disbursements to
20 GUNS+ on its financial disclosure reports. *Id.* In fact, after the Complaint and Responses in this
21 matter were filed, the Committee filed a report entitled “Termination Report,” covering the time

⁷ Attached to Klingemann’s Response are samples of the e-mails, as revised. *Id.*

1 period from May 10, 2012, through June 7, 2012, which discloses an undated disbursement of
2 \$5,645.24 to GUNS+. The disbursement's purpose is labeled as "product for gun raffle."

3 In a Response filed by the Committee's treasurer, he denies any corporate sponsorship of
4 the raffle or any other illegal corporate support for the Klingemann campaign. Oberg Resp. at 1-
5 4. Oberg also asserts that the raffle was never "advertised in any media, nor has it been a 'public
6 communication' by the campaign" and states that the e-mails had been distributed to "friends and
7 family." *Id.* at 2. The Klingemann supporter who sent the e-mail, William Kelberlau, also
8 submitted a letter denying the Complaint's allegations. Kelberlau Letter at 1.⁸ Kelberlau further
9 states that the Complaint intentionally withheld attachments to the e-mails that requested raffle
10 ticket purchasers' names, addresses, telephone numbers, and e-mail addresses. *Id.*

11 Disclaimers are not required on e-mails by "persons other than political committees."
12 *Internet Communications*, 71 Fed. Reg. 18,589, 18,600-01 (April 12, 2006) (explanation and
13 justification). And political committees are only required to include disclaimers on
14 "substantially similar" e-mail communications exceeding 500 in number. *See* 11 C.F.R.
15 § 110.11(a).

16 Based on the Complaint and Responses, there is little indication that Kelberlau's
17 relationship with the Committee was anything more than that of a "campaign supporter" or
18 "private citizen." Kelberlau Resp. at 1; Klingemann Resp. at 2. Nor do we know how many
19 e-mails Kelberlau sent. We do not believe it is an efficient use of Commission resources to
20 investigate the allegations set forth in the Complaint as to the e-mails from Kelberlau, including

⁸ Kelberlau does not appear to have received a salary or other disbursements from the Committee, as no disbursements to him exceeding \$200 have been itemized on Schedule B of the Committee's disclosure reports. In his Response, he described himself as a "campaign supporter" but signed the response as "Raffle and Signs Coordinator." Kelberlau Letter at 1-2.

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1 whether they were “electronic mail of more than 500 substantially similar communications . . .
2 sent by a political committee” and, therefore, required a disclaimer. 11 C.F.R. § 110.11(a)(1).
3 Therefore, in furtherance of the Commission’s priorities and relative to other matters pending on
4 the Enforcement docket, we recommend that the Commission exercise its prosecutorial
5 discretion and dismiss this matter as to Eric for Texas Campaign and David Oberg in his official
6 capacity as treasurer. With respect to Mr. Klingemann individually, the record in this matter
7 does not indicate that he violated the Act or underlying Commission regulations. Therefore, we
8 recommend that the Commission make no reason to believe findings as to him, regarding the
9 allegations contained in the Complaint.

10 The allegation that the Committee may have accepted an in-kind contribution of firearms
11 from GUNS+ is refuted by the affidavit from Simank and the Responses of Klingemann and the
12 Committee. These explain that the Committee had arranged to purchase the firearms from
13 GUNS+ at fair market value. Therefore, we recommend that Commission find no reason to
14 believe that GUNS+ violated the Act or underlying Commission regulations as to the allegations
15 contained in the Complaint. Finally, we recommend that the Commission approve the attached
16 Factual and Legal Analyses and the appropriate letters, and close the file.

17 **RECOMMENDATIONS**
18

- 19 1. Dismiss the allegation that Eric for Texas Campaign and David Oberg in his official
20 capacity as treasurer violated the Federal Election Campaign Act of 1971 or
21 underlying Commission regulations, pursuant to the Commission’s prosecutorial
22 discretion.
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2. Find no reason to believe that Eric Klingemann violated the Federal Election Campaign Act of 1971, as amended, or underlying Commission regulations as alleged in the Complaint;
3. Find no reason to believe that GUNS+ violated the Federal Election Campaign Act of 1971, as amended, or underlying Commission regulations as alleged in the Complaint;
4. Approve the attached Factual and Legal Analyses and the appropriate letters; and
5. Close the file.

Anthony Herman
General Counsel

7/3/13
Date

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